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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-1909

EVE WHITE a/k/a EVE CASCIO

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Minnesota child pornography statute, § 617.246 (1989), constitutional under the First and Fourteenth Amendments to the United States Constitution, although this statute imposed criminal liability upon Petitioner's conduct without affording Petitioner a defense based upon mistake of age of the minor employed by Petitioner to engage in a sexual performance?

2. Is Minnesota child pornography statute § 617.246 (1989), constitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, although this statute imposed criminal liability upon Petitioner for employing a minor to engage in a sexual performance when the minor used a false Minnesota identification card, fraudulently obtained from the State of Minnesota, to misrepresent her age when seeking employment from Petitioner?

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STATEMENT OF THE CASE

In this case, Petitioner, following a jury trial, was convicted of the felony of using a minor in a sexual performance. As a result of this conviction, Petitioner was placed on five years of probation and ordered to pay a $5,000 fine. The judgment of conviction was affirmed by the Minnesota Court of Appeals on December 31, 1990. On March 15, 1991, the Minnesota Supreme Court denied Petitioner's petition for review. Petitioner now seeks a writ of certiorari from this Court.

Petitioner's Statement of the Case to this Court is inaccurate at page six in that it implies that Petitioner was thorough in attempting to verify the age and identity of the nude dancers she hired

to perform at the Minneapolis, St. Paul, and Duluth, Minnesota, bookstores owned by Ferris Alexander. In the case of 17-year-old R.A.R., hired by Petitioner in the instant case, although Petitioner accepted a false Minnesota identification card identifying R.A.R. as her 26-year-old sister, Sheryl Reynolds, Petitioner remarked that R.A.R. looked younger than the age given on this identification card. (*T. 80)

Despite the facts that R.A.R. looked younger than 26 years old, had no other identification, and could not produce a social security card or number, Petitioner did virtually nothing to avoid hiring this

*T. refers to trial transcript.

underage performer. Petitioner never asked to see R.A.R.'s social security card after hiring R.A.R. (T. 80, 434) Petitioner simply had R.A.R. repeat the information on the false identification card, compared R.A.R.'s signature on a W-4 form with her signature on the false identification card, and later, accepted a false social security number from R.A.R. over the telephone. (T. 435, 80)

Petitioner's Statement of the Case to this Court is incomplete in that it fails to inform this Court that Petitioner testified at her trial that she was really not concerned about the true identity of the performers she hired to engage in sexual performances. Petitioner was frequently unaware of the true name

of any of the performers she hired. Ninety percent of the girls hired by Petitioner used false names. (T. 464)

Petitioner's Statement of the Case to this Court also fails to inform this Court that another dancer at the Wabasha Bookstore in Duluth, Minnesota, and a clerk at this store, testified that there is no way they believed that R.A.R. was 26 years old. Sandra Keinbaum testified that when she saw R.A.R. during the first week of May, 1989 there was no way she would have thought R.A.R. was 26 years old. (T. 239) Cliff Bergstrom, a clerk, testified that R.A.R. looked a lot younger than 26 and he would not have believed the false Minnesota Identification Card

indicating R.A.R. was 26 years old if he had been shown the card. (T. 287)

ARGUMENT

I.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHOLDING THE CONSTITUTIONALITY OF A CHILD PORNOGRAPHY STATUTE IMPOSING CRIMINAL LIABILITY UPON PETITIONER REGARDLESS OF HER MISTAKEN KNOWLEDGE OF THE AGE OF THE MINOR EMPLOYED BY HER IS ABSOLUTELY CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

Contrary to the argument in support of Petitioner's petition for writ of certiorari to this Court, the decision of the Minnesota Court of Appeals in State v. White, 464 N.W.2d 585 (Minn. App. 1990) and the decision of the Minnesota Supreme Court on March 15, 1991 denying further review of this case are absolutely consistent with decisions of this Court.

In fact, if the Minnesota appellate courts had declared Minnesota Statute § 617.246, Subd. 2 and Subd. 5 unconstitutional under the First and Fourteenth Amendments in the instant case, the Minnesota courts would have had to ignore the constitutional mandates of this Court in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), and in Osborne v. Ohio, _____ U.S. _____ 110 S.Ct. 1691 (1990).

Moreover, this Court has already denied certiorari after the Minnesota appellate courts previously upheld the constitutionality of Minnesota Statute § 617.246 in State v. Fan, 445 N.W.2d 243 (Minn. App. 1989), pet. for rev. denied (Minn. October 31, 1989), cert. denied.

_____ U.S. _____ 110 S.Ct. 1480, 108 L.Ed.2d 617 (1990).

The obscenity cases cited by Petitioner are not applicable to this child pornography case. Given the extremely important State interest in protecting the victims of child pornography, the constitutionality of statutes enacted "to eradicate child pornography," Osborne, 110 S.Ct. at 1700, like Minnesota Statutes § 617.246 need not be reviewed again by this Court. Obscenity is irrelevant to child pornography which is not protected by the First Amendment. Ferber, supra.

Respondent seriously challenges the characterization of Petitioner as a "conscientious promotor of First Amendment

activities who conscientiously attempts to comply with the law." Petition for writ of certiorari at page 16. The evidence in the instant case contradicts that assertion. Although Petitioner personally believed R.A.R. was younger than the 26 years indicated on her I.D. card, and although R.A.R. had no other forms of identification and could not even produce a social security card or number during her employment interview by Petitioner, 17-year-old R.A.R. was hired by Petitioner to engage in pornographic sexual performances. Moreover, the record in the instant case clearly indicates that Petitioner cared little about the true identity of the girls she hired as nude dancers.

Also, this is not a case involving "the producer of a book, magazine, or motion picture film," as represented at page eight of the petition for certiorari. Instead, this is a case involving the hiring of a minor to engage in live entertainment at the Wabasha Bookstore in Duluth, Minnesota, consisting of nude dance performances through glass panels to customers sitting in booths and inserting coins into a timing mechanism permitting the customers to observe the dancers like R.A.R. (T. 40-45)

In the most recent pronouncement by this Court in Barnes v. Glen Theatre, Inc., _____ U.S. _____ 59 LW 4745 (June 21, 1991) an Indiana statute prohibiting completely nude dancing by

adult females in a bookstore circumstance virtually identical to that in the instant case was upheld as constitutional over a First Amendment challenge. Certainly, the Minnesota statute challenged on First Amendment grounds in the instant case, which prohibits the use of minors in sexual performances, much more readily passes constitutional muster.

Finally, as indicated by the Minnesota Court of Appeals in White, 464 N.W.2d at 589, the Minnesota statute in question here affects expressive conduct, rather than speech, and it contains a scienter requirement for the content of the performance. Hence, U.S. v. United States District Court, 858 F.2d (9th Cir.

1988) does not conflict with the instant case.

Moreover, under Barnes v. Glen Theatre, Inc., 59 LW 4745, Petitioner's claim that nude dancing is a form of constitutionally protected expression is no longer correct. Plainly and simply, there is no need for this Court to grant certiorari to review the instant case on First Amendment grounds.

II.

NO DUE PROCESS VIOLATION HAS OCCURRED IN THIS CASE AS A RESULT OF PETITIONER BEING DENIED A MISTAKE OF AGE DEFENSE, NOR AS A RESULT OF THE STATE OF MINNESOTA ISSUING A FALSE MINNESOTA IDENTIFICATION CARD TO THE MINOR HIRED BY PETITIONER TO ENGAGE IN A SEXUAL PERFORMANCE.

First, Petitioner is absolutely incorrect that "this Court has never

upheld the imposition of strict liability for a serious felony offense like that created by Section 617.246." Petition at page 19. Both this Court and United States Courts of Appeals have upheld the constitutionality of strict liability felony offenses. See U.S. v. Freed, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); U.S. v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943); U.S. v. Behrman, 258 U.S. 280, 42 S.Ct. 303, 66 L.Ed 619 (1922); U.S. v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604 (1922); U.S. v. Brooks, 841 F.2d 268 (9th Cir. 1988); and U.S. v. Hamilton, 456 F.2d 171 (3rd Cir.), cert. denied, 406 U.S. 947, 92 S.Ct. 2051, 32 L.Ed.2d 335 (1972).

Moreover, the Minnesota Statute at issue in the instant case is not a pure "strict liability" statute. Section 617.246 does contain a scienter requirement for the content of the performance for which the minor is employed. State v. White, 464 N.W.2d at 589; State v. Fan, 445 N.W.2d at 247.

Petitioner, in footnote #7 of her petition to this Court, attempts to distinguish Freed on the grounds that Freed upheld a strict liability regulatory statute enacted in the interest of the public safety, health and welfare. Certainly, as indicated by this Court also in Ferber and Osborne, statutes like Section 617.246 are also enacted in the

interest of public health, welfare, and safety of our children.

In addition, Petitioner's due process claim that her conviction must be reversed because "the State of Minnesota was an active and crucial participant," (petition at page 23) in R.A.R.'s misrepresentation of age to Petitioner is patently false. The evidence clearly indicates that the State of Minnesota did not affirmatively or actively participate with R.A.R. in her misrepresentation of age to Petitioner.

After being defrauded by R.A.R., a clerk at the Department of Public Safety of the State of Minnesota simply issued the false Minnesota Identification Card to R.A.R. as required by Minnesota Statutes § 171.07, Subd. 3. Neither this

clerk, nor anyone else employed by the State of Minnesota, then instructed R.A.R. to go use the Minnesota Identification Card to get employment in the pornography industry. Neither this clerk, nor anyone else employed by the State of Minnesota, contacted Petitioner and told her to hire R.A.R. to work in the Ferris Alexander bookstores in Minneapolis, St. Paul, and Duluth. Plainly and simply, the State of Minnesota was not "an active and crucial participant" in R.A.R.'s misrepresentation.

Petitioner's cited authorities of Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), U.S. v. Laub, 385 U.S.

475, 87 S.Ct. 547, 17 L.Ed.2d 520 (1967), U.S. v. Pennsylvania Chemical Corp., 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973), and U.S. v. Brady, 710 F. Supp. 290 (D. Colorado 1989) are easily distinguishable from the instant case.

Raley, Cox, and Brady, all involved instances where someone in authority in government erroneously instructed the accused about the law. The accused persons then acted in accordance with the erroneous instructions only to be prosecuted and convicted by the government for these actions. It is obvious that it violates due process to convict the defendants of crimes in these cases.

In Laub, this Court simply affirmed a dismissal of an indictment charging an

immigration law violation which did not actually exist in the statute. Finally, in U.S. v. Pennsylvania Chemical Corp., this Court prevented the government from proceeding with a prosecution under a statute when the defendant corporation relied on an administrative interpretation of the statute published by the U.S. Army Corp of Engineers permitting performance of the charged acts.

Plainly and simply, Petitioner did not employ 17-year-old R.A.R. to engage in a sexual performance in the instant case as a result of any instructions from anyone in authority for the government only to be prosecuted for doing so.

It is instructive to note that Petitioner's argument on this issue

contradicts itself at page 24 of the petition. Here, even Petitioner concedes that when the State of Minnesota issued R.A.R. the false identification card, "it did so plainly for the purpose of permitting her to establish her identity and age for all lawful purposes." (emphasis supplied) Clearly, when 17-year-old R.A.R. used this false I.D. card to gain employment from Petitioner as a nude dancer, R.A.R. was not using this fraudulently obtained I.D. card for a lawful purpose. Petitioner could not lawfully hire performers under 18 years of age for the sexual performances at her bookstores.

Unlike the situations in Raley, Cox, Pennsylvania Chemical Corp., and Brady,

in the instant case, there is absolutely no fundamental unfairness or injustice in prosecuting, convicting, and punishing Petitioner for hiring a minor to engage in sexual performances for the pornography industry. Seventeen-year-old R.A.R. could have gotten her false identification misrepresenting her age from illegal sources, as well as the State of Minnesota. By defrauding the State of Minnesota and obtaining her false identification from the State, R.A.R. did not preclude her protection, as a minor, from the pornography industry under Minnesota Statutes § 617.246.

CONCLUSION

Neither the First nor Fourteenth Amendments to the United States Constitution were violated by the successful prosecution of Petitioner for violating Minnesota Statutes § 617.246, which was enacted to combat child pornography.

The decisions of the Minnesota Court of Appeals and Minnesota Supreme Court to uphold the constitutionality of Minnesota Statutes § 617.246 against First Amendment and Due Process claims are absolutely consistent with the decisions of this Court in Ferber, Osborne, and most recently, in Barnes. In fact, because the conduct regulated by the Minnesota statute in question here is not speech, this

statute is arguably not even subject to First Amendment scrutiny at all. Barnes, 59 LW at 4748-4751 (J. Scalia concurring).

By enacting Minnesota Statute § 617.246, the Minnesota legislature constitutionally exercised the State's traditional police power to protect the public health, safety, and morals. This child pornography statute furthers the compelling government interest in protecting the physical and psychological well-being of the children of this nation. To accomplish these ends, this statute properly places a heavy burden on persons, like Petitioner, who hire individuals to perform in sexual performances to make sure they do not hire minor children.

All adult nude dancing is not suppressed by this statute as Petitioner

claims. Nude dancing is no longer constitutionally protected, per se, anyway.

For all of the foregoing reasons, Respondent respectfully requests that the writ of certiorari to review the decisions of the Minnesota appellate courts not issue. There is absolutely no special and important reason why this case should be reviewed by the United States Supreme Court.

Dated: July 11, 1991.

Respectfully submitted,

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